

# School Law Matters

AUGUST 2010



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

Route to: Board  Personnel  Instruction  PPS  Business  Other: \_\_\_\_\_

## FREE Clients & Friends School Law Briefing on:

### New Legal Mandates Effecting Teacher and Principal Evaluations

The State Legislature, New York State Education Department and NYSUT, in their efforts to secure federal "Race-To-The-Top" funds for New York, have negotiated and implemented significant and in some cases onerous new changes to laws and Commissioner's regulations governing how school districts will conduct performance reviews of teachers and principals. Many of these changes must be negotiated or implemented during the 2010-11 school year. Districts' new APPR Plans must be in place by July 1, 2011, but prior to that time, numerous issues must be addressed and/or negotiated with your unions, including new evaluation procedures and criteria, mandatory training for evaluators, improvement plans and, for the first time, mandatory evaluation appeal procedures for teachers and principals. These changes will also have an obvious impact on recommendations for tenure and promotions, as well as disciplinary proceedings under Section 3020-a of the Education Law .

You are invited to the latest of our law firm's ongoing series of "School Law Briefings." This two-hour Briefing will review the new mandates and examine negotiations strategies and other important legal and practical aspects of planning for and addressing the new mandates. There is no fee for the program at any of the locations.

The Briefings will take place as follows:

#### **August 17, 2010 (CANTON)**

8:00AM - 10:00AM  
Best Western University Inn  
Route 11  
Canton, NY

#### **August 19, 2010 (BUFFALO)**

8:00AM - 10:00AM  
Buffalo Marriott Niagara  
1340 Millersport Highway  
Amherst, NY

#### **August 19, 2010 (ROCHESTER)**

1:00PM - 3:00PM  
Holiday Inn Rochester Airport  
911 Brooks Avenue  
Rochester, NY

#### **August 24, 2010 (ALBANY)**

8:00AM-10:00AM  
The Desmond Hotel, 660 Albany-Shaker Road, Albany, NY

#### **August 24, 2010 (UTICA)**

1:00PM - 3:00PM  
Hotel Utica  
102 Lafayette Street  
Utica, NY

We hope you and your administrators who deal with these topics will be able to attend. We have limited space, however, so please register for one of these sessions as soon as possible. To register, please visit our Firm's website or call 315-437-7600 or 716-875-1406.

### Bidding Thresholds for Purchasing Goods Increased

Recently, the Governor signed into law a bill which increases the minimum requirement for bidding of purchase contracts for materials, supplies, and equipment from \$10,000 to \$20,000. This is generally interpreted as covering groups of items as well as individual items. The effective date of this change was June 22, 2010. Reference to the new threshold can be viewed at the New York State Education Department's Management Services' website at <http://www.emsc.nysed.gov/mgtserv/purchasing/handbook3.html#chapIV>. Districts should review their Board policies on purchasing to determine if the policy should be amended to correspond with the new limit.

If you have any questions regarding the new law, please feel free to

#### *In This Issue ...*

- FREE Clients and Friends School Law Briefing: New Legal Mandates Effecting Teacher and Principal Evaluations
- Bidding Thresholds for Purchasing Goods Increased
- Document Compliance with Statutory Notice Posting Requirements
- FMLA Waivers Now Enforceable Without Court or DOL Approval
- Electronic Document Retention Policies May Guard Against Sanctions
- Failing to Comply with SED Reporting Requirements May Jeopardize Building Permits
- The Importance of Providing Written Notice of Board Action
- COBRA Subsidy Ended May 31 but Don't Forget 15-Month Change

**Client Reminder:****Document Compliance with Statutory Notice Posting Requirements**

Various state and federal laws require that employers post notices in the workplace advising employees of their rights under specific statutes. An example of a federal law that requires such posting by employers is the Family and Medical Leave Act ("FMLA"). The FMLA requires an employer:

... to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions... (emphasis added)

Employees have a federal cause of action in the event that their employer interferes with, restrains, or denies their benefits as provided under the FMLA by failing to post the required notice of FMLA rights. As one federal judge recently noted in a decision denying a school district's motion to dismiss a federal complaint,

"... so long as there are issues of fact which, if true, would establish that plaintiff was somehow hindered from exercising her rights by defendant's failure to provide notice of the protections afforded under the Act, plaintiff may state a second claim under § 2615(a)(1) for interference with her FMLA rights..."

Accordingly, it is important to ensure that your School District is complying with the various statutory notice posting requirements.

Required notices should be posted on a school district's web page, in employee handbooks, and in locations in the workplace that are likely to be observed by all employees.

Whether or not an employer actually posted a given notice can sometimes be a matter of dispute. An employer may insist that it posted the required notice at the appropriate locations, while an employee may claim that no such notices were posted. Such factual disputes can sometimes prevent the early dismissal of lawsuits, and may prevent an employer from taking advantage of certain types of defenses to lawsuits.

In order to obtain the maximum legal protection, employers should document their compliance with the statutory posting requirements. This can be accomplished through the use of an "affidavit of posting" wherein the individual who posted the notice contemporaneously executes a simple sworn affidavit attesting to the date and location of the posting.

In addition to an affidavit of posting, a digital camera can be used to also document the posting by contemporaneously photographing the notices posted in various locations, and attaching the affidavit of posting to a print out of the photograph. The affidavits of posting and the photographs can be scanned and emailed to create further proof regarding where and when the notices were actually posted.

The relatively simple step of documenting your compliance with a statute's requirement "to post and keep posted" certain notices can provide a valuable defense against a variety of legal claims. It can also make it much more unlikely that a court will excuse an employee's failure to comply with his or her obligations under a statute based on an, "I did not know I had to..." excuse.

Because of the "post and keep posted" requirement, it is advisable to confirm and document that the postings are in place at least twice a year.

In the event that you have questions or concerns regarding notice posting requirements and steps to document compliance with those requirements, contact attorney Charles Symons at 315-437-7600 or 716-875-1406.

**Waivers of Past FMLA Violations Now Enforceable Without Court or DOL**

The recently amended Family and Medical Leave Act (FMLA) regulations, adopted by the U.S. Department of Labor (DOL), reversed a long-standing rule that employees could not waive their rights under the FMLA in a dispute settlement or severance agreement. The 1995 regulations stated that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." Understandably, some courts construed this

language as prohibiting settlement agreements and other retroactive waivers (like those appearing in severance agreements) without DOL or court approval. The recently amended regulations insert the word "prospective" before the word "rights," and include an express provision permitting "the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court." 29 CFR § 825.220(d).

Accordingly, it is now clear that employers can obtain a valid waiver of an employee's right to sue under the FMLA for incidents occurring in the past. This does not mean, however, that an employee can prospectively waive his/her right to take FMLA leave or waive his/her right to sue for future violations. If you have any questions, please feel free to contact us.

## Electronic Document Retention Policies May Guard Against Costly Sanctions

### **Should your District/BOCES have a policy which sets forth when and how its electronic files (including e-mail) are either retained or deleted?**

One recent case, i.e., *Residential Funding Corp. v. DeGeorge Fin. Corp.*, suggests that you should. In *Residential Funding*, the Second Circuit Court (the Federal Appeals Court with jurisdiction over New York) ruled that if your organization does not have an electronic document retention policy and as a result you cannot produce such documents for litigation, you may be liable for monetary and other penalties that can severely damage your case.

*Residential Funding* involved a breach of contract litigation. When the litigation reached the discovery phase (the phase where evidence is exchanged between the parties), DeGeorge served its document discovery requests on Residential, which included a request for all documents, including electronic mail, relating to DeGeorge. Residential was unable to locate and retrieve the email in a timely fashion.

The Second Circuit applied a long-standing legal principle ("spoliation doctrine"), ruling that courts have broad discretion in fashioning an appropriate penalty for this delay, including delaying the start of a trial (at the expense of the party who failed to produce the evidence), declaring a mistrial, if the trial has already commenced, or proceeding with a trial with an adverse inference instruction to the jury (i.e., telling the jury that failing to produce the evidence must mean that the evidence is damaging to the party's case). The Court also noted that these sanctions could

be imposed not only if the party failed to produce the evidence through bad faith or gross negligence, but also through ordinary negligence.

This ruling suggests that school districts and BOCES should establish electronic document retention protocols governing storing, recovering and purging electronic data. The policy (which need not be a formal Board of Education policy) should recognize that all information, electronic and otherwise, which is relevant to litigation that has been threatened or commenced, must be retained for the duration of any such litigation.

The policy should also address the special mandates that school districts and BOCES must comply with in this regard. Under New York's Arts and Cultural Affairs Law, the State Education Department (SED) and the State Archives and Records Administration (SARA), have established rules regarding the retention of all "official records". (See SED's Records Retention and Disposition, Schedule ED-1.) E-mail messages are considered official records when they are created or received in the course of business and are retained as evidence of official decisions, actions, or transactions.

Court rulings have consistently confirmed that e-mail messages may be official records and that organizations must treat them as they do records in other formats. Since many copies of a single e-mail message may exist within a single organization, however, users must identify the record copy, which often but not always will be the sender's copy. For instance, if the head of a department sends out a policy di-

rective to everyone on staff, every copy of that e-mail is not a record, but the copy in the department head's mailbox is.

E-mail messages that are usually records include: Policies and directives; Correspondence or memoranda related to official business; Work schedules and assignments; Agendas and minutes of meetings; Documents that initiate, authorize, or complete a business transaction; Final reports or recommendations; etc.

The definition of official records specifically excludes extra copies of documents, as well as: personal messages and announcements not related to official business; copies of documents distributed for convenience or reference; announcements of social events, such as retirement or holiday parties; or phone messages. In other words, under New York State law and regulations, a school district or BOCES policy on electronic document retention would need to acknowledge that they are required to retain e-mail messages which are "official records" for the timeframes outlined in the SED's Records Retention and Disposition, Schedule ED-1.

The policy should also provide a protocol for retrieving electronic documents. As *Residential Funding* points out, even a delay in retrieving the documents can lead to court-imposed penalties.

Lastly, the policy should clearly spell out the criteria that will be used as well as a protocol for purging stored

Continued on the next page

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## Electronic Document Retention Policies May Guard Against Costly Sanctions (cont'd)

information. Should the information be purged in accordance with a sound document retention policy, under circumstances where there is no indication that the information might be

needed for litigation or required to be retained under state law, a court would not likely view the failure to produce that evidence as negligence warranting sanctions.

If you have any questions, or need assistance in crafting an electronic document retention policy, please feel free to contact us.

## Failure to Comply with SED Reporting Requirements Can Lead to Denial of Building Permits

The New York State Department of Education's Office of Facilities Planning (OFP) is in the process of implementing a new policy (which became effective July 1, 2010) in an attempt to encourage better compliance with the Commissioner of Education's regulations and OFP's requests for information. For example, OFP reports that it requested documentation from several hundred districts earlier this year regarding folding partition maintenance requirements (as they are empowered to do under

the Commissioner's regulations). After several notices and some telephone follow-up, there were still significant numbers of districts that did not respond to the request. Additionally, a number of districts have not submitted the required 2009 AVI by the statutory deadline of January 15, 2010.

mits and building aid for all projects in districts where there are outstanding compliance issues. Any districts that are included in the above examples should resolve any issues as soon as possible. This policy will remain in effect for future requirements such as the 2010 Building Condition Survey.

According to OFP officials, they cannot ignore non-compliance with Commissioner's regulation. Thus, on July 1, 2010, OFP began denying building per-

If you have any questions regarding this new enforcement policy, please feel free to contact us.

## The Importance of Providing Written Notice of Board Action

Whenever a Board of Education votes on a personnel matter, a follow-up correspondence should always be sent to the affected employee notifying the employee of the Board action. This is particularly important when a Board votes to suspend or terminate an employee. A copy of the correspondence describing the Board action should also be placed immediately in the employee/former employee's personnel file. Fail-

ing to provide such correspondence following Board action can have the effect of extending the time period within which the employee can pursue legal action against a School District or its Board members, employees, or officers.

In cases where there is any reason to suspect that some type of legal proceeding may be initiated following the

Board action, the correspondence advising the employee of the Board action should be sent via regular first class mail, and via certified mail, return receipt requested. Providing such correspondence serves to ensure that affected employees are promptly put on notice of the action taken by the Board, and serves to prevent employees from pursuing legal challenges to Board action long after the fact.

## COBRA Subsidy Ended May 31 but Don't Forget the 15-Month Change

As most employers are aware, COBRA allows certain people to extend employer-provided group health coverage if they would otherwise lose the coverage due to qualifying events such as loss of a job. President Obama's "Stimulus Package", which was enacted in February 2009 as the American Recovery and Reinvestment Act of 2009 (ARRA), temporarily reduced the premium for COBRA (or comparable State continuation coverage) for eligible individuals. Specifically, employers were required to pay 65% of the premium costs while the eligible individu-

als paid only 35%. This subsidy program recently ended on May 31, 2010. While there has been a great deal of discussion in Congress over extending the subsidy program further, no such law has been passed. In other words, employees involuntarily terminated after May 31, 2010 are not entitled to the COBRA subsidy.

How long do employers have to continue paying the 65% of the premium costs for the employees (and their beneficiaries) who were involuntarily terminated between February 2009 and May 31, 2010? Initially, the law set the

maximum period for receiving the subsidy at nine months. Recently, however, the Department of Defense Appropriations Act, 2010 (2010 DOD Act) amended ARRA to extend the maximum period for receiving the subsidy an additional six months (from nine to 15 months).

If you have any questions regarding the COBRA subsidy, please feel free to contact us.